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The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused *shall enjoy* the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed."[1]

I. INTRODUCTION

Overtime, limitations have been placed on when peremptory challenges can be exercised in order to prohibit discriminatory use. To create a truly impartial jury of a defendant's peers, peremptory challenge reform is still needed. Although the Washington Supreme Court adopted General Rule 37 (GR 37)[2] to address implicit bias in the use of peremptory challenges in 2018, the conversation around these challenges and reforms has continued to evolve and Washington should take additional steps to effectuate the guarantee of the Sixth Amendment.

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[1] U.S. CONST. amend. VI (emphasis added). "[T]he United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from a 'representative cross-section of the community.'" People v. Wheeler, 583 P.2d 748, 754 (Cal. 1978); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS ch. 3 (1977).

[2] WASH. CT. G.R. 37 (2018).

Voir dire is the process of impaneling a jury and is integral to upholding each individual's Sixth Amendment right. The purpose of *voir dire* is to find and impanel peers who are open-minded and can fairly serve as jurors.[3] During *voir dire*, attorneys ask potential jurors a set of questions relating to the issues and facts in the case and also attempt to create a favorable impression with the jurors.[4] Attorneys may then eliminate potential jurors by the use of peremptory challenges. Initially arising "as a means to select a qualified and unbiased jury," peremptory challenges have existed nearly as long as juries.[5] Peremptory challenges are "objection[s] to a juror for which no reason need be given, but upon which the court shall exclude the juror,"[6] and are used during *voir dire* in both civil and criminal trials.[7] In Justice O'Connor's dissenting opinion in *Edmonson v. Leesville Concrete Co.*, she described the purpose of peremptory challenges and the private choices that litigants are able to make in their exercise of a peremptory:

> The peremptory challenge "allows parties," in this case *private* parties, to exclude potential jurors. It is the nature of a peremptory that its exercise is left wholly within the discretion of the litigant. The purpose of this longstanding practice is to establish for each party an "arbitrary and capricious species of challenge" whereby the "sudden impressions and unaccountable prejudices were apt to conceive upon the bare looks and gestures of another" may be acted upon. By allowing the litigant to strike jurors for even the most subtle of discerned biases, the peremptory challenge fosters both the perception and reality of an impartial jury. In both criminal and civil trials, the peremptory challenge is a mechanism

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[3] WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS – CRIMINAL §1.01 (4th ed. 2016).

[4] WALLACE D. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS, CASES, READINGS, AND TEXT 387 (1984).

[5] Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451, 454 (2000); *see* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369, 374 (1992).

[6] WASH. REV. CODE ANN. § 4.44.140 (West Supp. 2003).

[7] 28 U.S.C.A. § 1870 (West 1948); FED. R. CRIM. P. 24(b).

> for the exercise of *private* choice in the pursuit of fairness. The peremptory is, by design, an enclave of private action in a government-managed proceeding.[8]

As indicated by Justice O'Connor, each individual's Sixth Amendment right to an impartial jury must be held and, in doing so, pursue opportunities for fairness.[9] The purpose of peremptory challenges is to create a jury that is free from outside or pre-existing biases.[10] Yet, through the use of peremptory challenges, a jury can lose its impartiality because the challenges are often used to exclude jurors based on attorneys' pre-existing biases.[11] The overarching goal of pursuing fairness by creating an impartial jury can thus be undermined if peremptory challenges are used to discriminatorily exclude potential jurors instead.

Peremptory challenges are intended to help create an impartial jury that is open-minded and ready to listen to a case's evidence and the related law.[12] Unfortunately, due to the time constraints in conducting *voir dire*, an

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[8] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633–34 (1991) (O'Connor, J., dissenting).

[9] *See id.*; WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS – CRIMINAL §1.01 (4th ed. 2016).

[10] WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS – CRIMINAL §1.01 (4th ed. 2016).

[11] ELISABETH SEMEL, DAGEN DOWNARD, EMMA TOLMAN, ANNE WEIS, DANIELLE CRAIG & CHELSEA HANLOCK, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS iv, 2 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/B28C-25YW].

[12] Richard Gabriel, *Understanding Bias: Preserving Peremptory Challenges, Preventing Their Discriminatory Use, and Providing Fairer and More Impartial Juries*, CIVIL JURY PROJECT AT NYU SCHOOL OF LAW, https://civiljuryproject.law.nyu.edu/understanding-bias-preserving-peremptory-challenges-preventing-their-discriminatory-use-and-providing-fairer-and-more-impartial-juries/ [https://perma.cc/U9PG-AXPR]; *see also* Press Release, ACLU, Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection: New Rule Addresses Failings of U.S. Supreme Court Decision (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury [https://perma.cc/N76F-9FMA] [hereinafter ACLU Press Release].

attorney's biases are often at play in their use of a peremptory challenge.[13] Implicit and explicit biases in jury selection are not a new issue.[14] A number of cases have been brought before the United States Supreme Court and other state supreme courts to address the discriminatory use of peremptory challenges.[15] These cases exemplify the history of implicit and explicit bias in jury selection across the nation, which has repeatedly denied people of color their Sixth Amendment right to an impartial jury of their peers.[16] In *Batson v. Kentucky*, the United States Supreme Court attempted to prevent the discriminatory use of peremptory challenges by creating a three-part framework and holding that a prosecutor must come up with a neutral explanation for using a peremptory challenge.[17] However, many scholars argue that *Batson* failed to prevent such discriminatory use of the challenges and the unfair exclusion of jurors of color.[18] Numerous cases since *Batson* have attempted to address the problems *Batson* could not solve regarding race and gender discrimination in jury selection.[19] As courts have

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[13] Gabriel, *supra* note 12; *see also* ACLU Press Release, *supra* note 12.

[14] ACLU Press Release, *supra* note 12; *see also* Gabriel, *supra* note 12.

[15] *See* Batson v. Kentucky, 476 U.S. 79 (1986); *see also* J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127 (1994); City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); State v. Jefferson, 429 P.3d 467 (Wash. 2018); State v. Gonzalez-Sandoval, 431 P.3d 850 (Kan. 2018); State v. Berhe, 444 P.3d 1172 (Wash. 2019); State v. Veal, 930 N.W.2d 319 (Iowa 2019).

[16] ACLU Press Release, *supra* note 12; *see also* Gabriel, *supra* note 12.

[17] *See* Amy Wilson, Note, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009).

[18] *See id.*; *see also* Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163 (2014); Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. DAVIS L. REV. 1359 (2012) [hereinafter Roberts, *Disparately Seeking Jurors*]; Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981 (1996).

[19] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); *see also* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); State v. Jefferson, 429 P.3d 467 (Wash. 2018); State v. Gonzalez-Sandoval, 431 P.3d 850 (Kan. 2018); State v. Berhe, 444 P.3d 1172 (Wash. 2019); State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Gentry, 449 P.3d 707 (Ariz. Ct. App. 2019); State v. Curry, 447 P.3d 7 (Or. Ct. App. 2019); State v. Holmes, 221 A.3d 407 (Conn. 2019); People v. Rhoades, 453 P.3d 89 (Cal. 2019).

attempted to resolve *Batson*'s shortcomings in regard to peremptory challenges, states have recognized the need to address discrimination during *voir dire*.

The Washington Supreme Court recently adopted a court rule, GR 37, and became the first court to attempt to address *Batson*'s limitations by eliminating both implicit and intentional racial bias in jury selection.[20] The ACLU explained the urgency behind the rule's creation: "For decades in Washington state, many people of color have been blocked from participating fully in our democracy as jurors for reasons unrelated to their ability to serve."[21] The Washington Supreme Court adopted GR 37 in April 2018 with the hope of increasing diversity in Washington's juries and reducing implicit racial bias from the state's jury selection process.[22] GR 37 is not intended to eliminate peremptory challenges but is rather an objection used to raise issues of improper bias.

The rule requires the party exercising the challenge to articulate the reasons for the challenge.[23] The court then evaluates the reasons given and "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge."[24] The purpose of GR 37 is to prevent the discriminatory use of peremptory challenges and eliminate the removal of jurors on the basis of their race or ethnicity.[25] GR 37 "applies to jury selection in both superior and district courts, and an objection under the rule can be raised by a party or by the court on its own

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[20] ACLU Press Release, *supra* note 12; WASH. CT. G.R. 37 (2018).
[21] ACLU Press Release, *supra* note 12.
[22] *Id.*
[23] WASH. CT. G.R. 37(d) (2018).
[24] WASH. CT. G.R. 37(e) (2018).
[25] Douglas J. Ende, *Peremptory Challenges – Generally – Permissible Grounds*, WASHINGTON PRACTICE – CIVIL PROCEDURE § 29:13, at 222, 227 (3d ed. 2018).

initiative."[26] It remains to be seen whether GR 37 will fill the hole left open by *Batson* by combatting implicit bias in the jury selection process.

Since Washington's enactment of GR 37, other states have also struggled to address the discriminatory use of peremptory challenges.[27] These states are looking to Washington's example to improve their own jury diversity. California has even begun the process of implementing similar language[28] to that used in Washington's GR 37. When accounting for racial, economic, religious, and political diversity, California is the most diverse state in the United States.[29] Like Washington, California has also struggled to address *Batson*'s shortcomings and impanel juries that are representative of the population.[30] In late February 2020, the California Supreme Court acknowledged a need to prevent discrimination occurring during *voir dire* and announced a plan to work with judges, prosecutors, defense counsel, and other practitioners to brainstorm measures to ensure juror diversity.[31] Instead of enacting a court rule, California went the legislative route and adopted Assembly Bill 3070 (AB 3070), which offers California the

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[26] *Id.*

[27] *See* State v. Gonzalez-Sandoval, 431 P.3d 850 (Kan. 2018); State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Gentry, 449 P.3d 707 (Ariz. Ct. App. 2019); State v. Curry, 447 P.3d 7 (Or. Ct. App. 2019); State v. Holmes, 221 A.3d 407 (Conn. 2019); People v. Rhoades, 453 P.3d 89 (Cal. 2019).

[28] A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

[29] *Most Diverse States 2020*, WORLD POPULATION REV., https://worldpopulationreview.com/states/most-diverse-states/ [https://perma.cc/7SVQ-MSSM].

[30] Press Release, Cal. S. Dist. 11, Senator Wiener Announces Bill to Ensure Jury Pools Reflect Diversity of Community (Mar. 5, 2017), https://sd11.senate.ca.gov/news/20170305-senator-wiener-announces-bill-ensure-jury-pools-reflect-diversity-community [https://perma.cc/4A3S-NEV9] [hereinafter Senator Wiener Announces Bill].

[31] Nate Gartrell, *California Supreme Court to Study Ways to Prevent Discrimination in Juries: Announcement Follows Call to Action in Contra Costa Murder Case*, MERCURY NEWS (Feb. 26, 2020), https://www.mercurynews.com/2020/02/26/ca-supreme-court-to-study-ways-to-prevent-discrimination-in-juries-across-the-state/ [https://perma.cc/3NNH-NNDS].

opportunity to eliminate discriminatory peremptory challenges.[32] With the changes to peremptory challenges in California and with similar discussions occurring in other states across the country,[33] Washington must remain an active participant in preventing the discriminatory use of peremptory challenges and in renewing belief in judicial integrity. The onus is now on the State of Washington to learn from the changes other states are making to peremptory challenges, to address GR 37's shortcomings, to make new suggestions for GR 37 implementation, and to push for a truly impartial jury once and for all.

II. ROADMAP

In Section III, this Note will examine the background history of peremptory challenges. This Note will also look at the differences in the use of the challenges in federal courts and in Washington and California state courts. Section IV of this Note will ask why implicit bias matters in jury selection and discuss how implicit biases relate to the exercise of peremptory challenges.

In Section V, this Note will then analyze key changes to peremptory challenges through case law, highlighting the importance of *Batson*. This portion will also address the changes to peremptory challenges that occurred before and after *Batson* in *Swain v. Alabama* and in *J.E.B. v. Alabama ex rel. T.B.*, respectively. Section VI of this Note will discuss the unique process for drafting and enacting GR 37 in Washington. This portion will provide the language of GR 37, the purpose of the rule, and the goal of the drafters. Section VI will then examine how an Iowa case has

[32] A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020); *see also* SEMEL ET AL., *supra* note 11, at 70.

[33] *See, e.g.*, State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Gentry, 449 P.3d 707 (Ariz. Ct. App. 2019); State v. Curry, 447 P.3d 7 (Or. Ct. App. 2019); State v. Holmes, 221 A.3d 407 (Conn. 2019); People v. Rhoades, 453 P.3d 89 (Cal. 2019).

referenced GR 37 and the need for the state to follow Washington's lead in implementing peremptory challenge reform.

In Section VII, this Note will use California as an example of a state that has followed Washington's lead in peremptory challenge reform. This Note will discuss California's reliance on GR 37 in addressing the discriminatory use of peremptory challenges. The current language of GR 37 and application of GR 37 in California's AB 3070 will be used as a framework to provide suggestions for where Washington needs to go from here. Section VII will also discuss the differences between California's AB 3070 and Washington's GR 37.

In section VIII, this Note will address how Washington must stay active in implementing peremptory challenge reform. This section will also examine another method for increasing diversity in juror representation by paying jurors at a higher rate per diem. Finally, section IX will conclude the Note.

III. BACKGROUND HISTORY OF PEREMPTORY CHALLENGES AND THE USE OF PEREMPTORY CHALLENGES IN FEDERAL AND STATE COURTS

A. A Brief History of Peremptory Challenges

Peremptory challenges have long been associated with the right to a jury trial, yet, the original construction of the challenges and reasons underlying the existence of peremptory challenges are largely unknown.[34]

> There has been a kind of mythic genealogy constructed about the peremptory challenge . . . [T]he idea of the peremptory challenge is old, but it is not nearly as old, deep, or widespread as the notion of the jury itself. Its ancient association with the right to trial by

[34] Montz & Montz, *supra* note 5, at 454–55.

> jury has cloaked it with a presumption of legitimacy bordering on, but never quite reaching, the constitutional.[35]

Though their exact origins are mysterious, peremptory challenges eventually came to the United States by way of the English jury system.[36] The English jury system, used by the English Crown as a method to select informed witnesses, began after the Norman Conquest in the eleventh century.[37] By the end of the thirteenth century, "[t]he crown subsequently began exercising unlimited peremptory challenges in capital cases, while the defendant was entitled to only thirty-five."[38] In 1305, parliament revoked the Crown's right to unlimited peremptory challenges.[39] The Crown was instead required to show cause for each challenge, and this led to a repudiation of the prosecutor's right to use a peremptory challenge in England.[40] Defendants retained their right to use peremptory challenges in felony trials.[41] Eventually, the use of the challenges in English criminal trials decreased until they were abolished as a method of jury selection in 1989.[42]

The American colonies adopted the British peremptory challenges, and subsequently, the challenges were incorporated into the federal courts and court rules of every state.[43] "[T]he right of the defendant to exercise peremptory challenges 'was accepted as part of the common law.'"[44] Initially, prosecutors were not allowed to use peremptory challenges, as the challenges were predominantly viewed as a shield mechanism for

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[35] Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 812 (1997).
[36] Montz & Montz, *supra* note 5, at 454; *see* LOH, *supra* note 4, at 386.
[37] Montz & Montz, *supra* note 5, at 454; *see* LOH, *supra* note 4, at 386.
[38] Montz & Montz, *supra* note 5, at 454; *see* Hoffman, *supra* note 35, at 819–820.
[39] Montz & Montz, *supra* note 5, at 455; *see* LOH, *supra* note 4, at 386.
[40] Montz & Montz, *supra* note 5, at 455; *see* LOH, *supra* note 4, at 386.
[41] Montz & Montz, *supra* note 5, at 455; *see* Hoffman, *supra* note 35, at 822.
[42] Montz & Montz, *supra* note 5, at 455; *see* Hoffman, *supra* note 35, at 822.
[43] Montz & Montz, *supra* note 5, at 455; *see* Broderick, *supra* note 5.
[44] SEMEL ET AL., *supra* note 11; *see also* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1719 n.21 (1977).

defendants to use to remove conviction-prone jurors.[45] Colonial courts also debated how many peremptory challenges should be allowed; with the permitted number challenges ranging from unlimited to none.[46] Eventually, prosecutors gained the right to use peremptory challenges in the late nineteenth and early twentieth centuries even though the ability to use a peremptory was not guaranteed by the Constitution.[47]

B. Peremptory Challenges in Federal Courts

Although the Constitution does not confer a right to use peremptory challenges, the United States Supreme Court has long recognized peremptory challenges as a means to obtaining an impartial jury.[48] The challenges are not protected by the federal constitution and are instead permitted by state statute or court rule.[49] The language of the state statutes and court rules regarding peremptory challenges is considerably varied. One constant is when peremptory challenges are used: during jury selection, or *voir dire*.[50] Peremptory challenges are used in both federal and state courts and the number of available peremptory challenges varies based on the type of case, ranging from three to twenty challenges.[51] In the federal system, peremptory challenges are often exercised at the end of *voir dire*, with each side submitting its strikes to the judge without knowing the other

[45] Montz & Montz, *supra* note 5, at 455; LOH, *supra* note 4, at 386; *see also* Hoffman, *supra* note 35, at 823.
[46] Hoffman, *supra* note 35, at 823; *see also* Montz & Montz, *supra* note 5, at 455; LOH, *supra* note 4, at 386.
[47] Montz & Montz, *supra* note 5, at 455; Note, *supra* note 44; *see also* Holland v. Illinois, 493 U.S. 474, 518 (1990) (Stevens, J., dissenting).
[48] Montz & Montz, *supra* note 5, at 455–56; *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting).
[49] *See, e.g.*, WASH. REV. CODE ANN. § 4.44.210 (West Supp. 2003).
[50] WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS – CRIMINAL §1.01 (4th ed. 2016).
[51] FED. R. CRIM. P. 24(b).

side's strikes and exercising their challenges blindly.[52] Conversely, in state courts, peremptories are generally exercised in a sequence, and both sides take turns and have the opportunity to hear the strikes made by the opposing side.[53] For example, in a civil case in Washington, the plaintiff is given the first chance to use a peremptory challenge to excuse a juror.[54] The defendant may then use a challenge, and the two parties continue alternating until the peremptory challenges are exhausted.[55]

The number of peremptory challenges that are available to each party differs depending on whether the case is civil or criminal, and the number of peremptories varies if the case is heard in a state or federal court.[56] Under the Federal Rules of Criminal Procedure for the United States District Court, Rule 24 provides the guidelines for peremptory challenges:

> **(b) Peremptory Challenges**. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.
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> **(1) Capital Case**. Each side has 20 peremptory challenges when the government seeks the death penalty.
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> **(2) Other Felony Case**. The government has 6 peremptory challenges and the defendant or defendants jointly have 10

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[52] *See, e.g.*, United States v. Warren, 25 F.3d 890, 894 (9th Cir. 1994) (holding the use of the blind strike method, in which the parties simultaneously exercise peremptory challenges to the jury panel without knowing which jurors their opponent struck, did not impair the defendant's full use of his or her peremptory challenges); United States v. Harper, 33 F.3d 1143, 1145–46 (9th Cir. 1994) (describing the blind-strike system utilized in the case); United States v. Bermudez, 529 F.3d 158, 163–64 (2d Cir. 2008) (holding the blind strike method did not violate the defendant's rights to due process and noting "all five circuits have considered similar challenges to the blind strike method and have upheld it as constitutional and consistent with Rule 24(b).").

[53] *See, e.g.*, WASH. REV. CODE ANN. § 4.44.210 (West Supp. 2003).

[54] WASH. REV. CODE ANN. § 4.44.210 (West Supp. 2003).

[55] *Id.*

[56] *Compare* FED. R. CRIM. P. 24(b), *with* FED. R. CIV. P. 48(a), *and* WASH. SUPER. CT. CRIM. R. 6.4(e) (2015).

> peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.
>
> **(3) Misdemeanor Case**. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.[57]

In state courts, permitted peremptory challenges also differ in number depending on the jurisdiction and court rule in place.[58] The number of peremptory challenges can also increase if an alternate juror is impaneled, though the number of additional challenges varies. Overall, the variance in number of allowed peremptory challenges is related to the severity of the case and restricted by the state's statute or court rule.

C. Peremptory Challenges in Washington State Courts

Washington Revised Code § 2.36.080(1) addresses a prohibition on being excluded from jury service and states: "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status."[59] The statute is not intended to apply specifically to the exercise of peremptory challenges, but instead focuses on a related issue of prohibiting the exclusion of an individual from being called to report for jury duty for a discriminatory reason.[60] In fact, the statute on its face gives deference to the exercise of peremptory challenges.[61]

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[57] *Id.*

[58] *See, e.g.*, ARK. CODE ANN. § 16-33-203 (West) (stating each party shall have three peremptory challenges); ARIZ. R. CIV. P. 47 (stating each side is entitled to four peremptory challenges); CONN. GEN. STAT. ANN. § 51-241 (West) (stating each party may challenge peremptorily three jurors); 735 ILL. COM. STAT. ANN. 5/2-1106 (stating each side shall be entitled to five peremptory challenges); MASS. GEN. LAWS ANN. CH. 234A, § 67B (West) (holding in a civil case each party shall be entitled to four peremptory challenges); TEX. R. CIV. P. RULE 233 (stating each party to a civil action is entitled to six peremptory challenges).

[59] WASH. REV. CODE § 2.36.080(1) (2018); Ende, *supra* note 25.

[60] WASH. REV. CODE § 2.36.080(4) (2018).

[61] Ende, *supra* note 25.

Peremptory challenges are regulated by Washington court rules, which state that peremptories may not be used to exclude potential jurors on the basis of race or ethnicity.[62] Under the Washington Superior Court Criminal Rules, Rule 6.4(e) defines peremptory challenges and outlines the use of the challenges in Washington courts:

> A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.[63]

Washington courts provide each party with the same number of peremptory challenges. Like other federal and state courts, Washington courts allow for a higher number of peremptory challenges as the severity of the possible penalty increases.[64] Rule 6.4 also provides guidelines for how peremptory challenges shall be exercised by both parties in Washington courts:

> After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.[65]

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[62] *Id.*
[63] WASH. SUPER. CT. CRIM. R. 6.4(e) (2015).
[64] *Id.*; *see also* CAL. CIV. P. CODE § 231(a).
[65] WASH. SUPER CT. CRIM. R. 6.4(e) (2015).

Like other state courts, Washington courts have each party to the case alternate as they use their peremptory challenges.[66] Although the nature of exercising a peremptory and the number of peremptories has remained fairly consistent in Washington, over time, the content of what constitutes a peremptory challenge has evolved.[67] Peremptory challenges can no longer be executed for excluding jurors on the basis of their race or gender or for other discriminatory reasons.[68] The changes to peremptory challenges have occurred incrementally over time.[69]

D. Peremptory Challenges in California State Courts

In criminal cases in California where the offense charged is punishable by death or with life imprisonment, the defendant and the people are allowed to exercise twenty peremptory challenges.[70] In trials for other offenses, each side is allowed ten peremptory challenges.[71] If the crime is punishable by imprisonment for one year or less, then each party is entitled to six peremptory challenges.[72] In civil cases in California, each side is entitled to six peremptory challenges.[73] The California Civil Courtroom

[66] *Id.*; *see also* WASH. REV. CODE § 4.44.210 (2020); Michael Paul Thomas, *Nature and Purpose*, CALIFORNIA CIVIL COURTROOM HANDBOOK AND DESKTOP REFERENCE § 29:25 (2019 ed.).
[67] Ende, *supra* note 25.
[68] *See* Batson v. Kentucky, 476 U.S. 79 (1976) (holding invalid peremptory challenges based on discriminatory reasons); *see also* Snyder v. Louisiana, 552 U.S. 472 (2008) (holding the defendant was entitled to a new trial because the prosecution's justification for using a peremptory challenge to dismiss an African-American juror was insufficient); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (holding peremptory challenges could not be used to strike potential jurors solely on the basis of their gender).
[69] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1976); Snyder v. Louisiana, 552 U.S. 472 (2008); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); State v. Jefferson, 429 P.3d 467 (Wash. 2018); State v. Gonzalez-Sandoval, 431 P.3d 850 (Kan. 2018); State v. Berhe, 444 P.3d 1172 (Wash. 2019); State v. Veal, 930 N.W.2d 319 (Iowa 2019).
[70] CAL. CIV. PROC. CODE § 231(a) (2017).
[71] *Id.*
[72] CAL. CIV. PROC. CODE § 231(b) (2017).
[73] CAL. CIV. PROC. CODE § 231(c) (2017).

Handbook and Desktop Reference outlines the nature and purpose of peremptory challenges:

> No reason need be given for challenging a juror peremptorily, and the court must exclude any juror so challenged. Thus, peremptory challenges have historically served as a valuable safety valve in jury selection. They allow a party to remove from the jury panel those who have individual characteristics which the party believes might make the potential juror sympathetic to the opposing party. Indeed, peremptory challenges may be properly used to excuse prospective jurors based on "hunches," and even "arbitrary" exclusion is permitted as long as not based on impermissible group bias.[74]

California's guiding courtroom handbook hints at how peremptory challenges may be used based on implicit and explicit biases held by the attorneys, but neglects to specifically acknowledge such biases.[75] Rather, the handbook mentions "individual characteristics which the party believes might make the potential juror sympathetic to the opposing party."[76] This language permitted attorneys in California to excuse jurors based on discriminatory preconceived biases and a "hunch" that the juror will be sympathetic to the opposing party. This use of peremptory challenges is exactly what California addressed in AB 3070[77] based on the changes Washington applied by enacting GR 37.[78]

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[74] Michael Paul Thomas, *Nature and Purpose*, CALIFORNIA CIVIL COURTROOM HORNBOOK AND DESKTOP REFERENCE § 29:23 (2019 ed.).
[75] *Id.*
[76] *Id.*
[77] A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020).
[78] Interview with Elisabeth Semel, Clinical Professor of Law and Director of Berkley Law's Death Penalty Clinic (Jul. 2, 2020).

IV. WHY DOES IMPLICIT BIAS MATTER WHEN SITTING ON A JURY AND HOW DO IMPLICIT BIASES RELATE TO THE USE OF PEREMPTORY CHALLENGES?

Implicit biases are often discriminatory and are composed of both subconscious attitudes that an individual has about a particular group and stereotypes that an individual associates with a particular group.[79] Individuals frequently do not even realize that they are harboring the biases because the biases can be very subtle.[80] Implicit biases are deeply engrained in an individual's patterns of behavior and therefore are hard to consciously detect. For instance, an individual may have an implicit bias about another person's age, gender, race, nationality, sexual orientation, religious beliefs, social status, body weight, disability, or other social identity.[81] Examples of implicit bias include associating a Black person with being a criminal or associating a woman with being weak.

In Washington, potential jurors are instructed about the importance of discharging their duties without perpetuating discrimination.[82] Jurors are specifically directed that "bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of [their] judgment throughout the trial, and that these [biases] are called 'conscious

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[79] Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012)) [hereinafter Roberts, *(Re)forming the Jury*]; *see* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 948–51 (2006).

[80] Roberts, *(Re)forming the Jury*, *supra* note 79, at 833; *see* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995); *see also* Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem and Self-Concept*, 109 PSYCH. REV. 3 (2002).

[81] Roberts, *(Re)forming the Jury*, *supra* note 79, at 833; *see also* SEMEL ET AL., *supra* note 11, at 30; *Education: About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/V2UF-F2YC].

[82] WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS – CRIMINAL §1.01 (4th ed. 2016).

biases.'"[83] The instruction to potential jurors also notes the presence of a more subtle tendency at work, implicit biases, and how those biases are also prohibited in the performance of their role as a juror:

> In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.[84]

Implicit biases can inhibit the ability of a juror to view the case and the accompanying facts with an open mind and can present difficulties for the juror as they try to pay close attention to both parties. A juror is tasked with listening to both parties present the case and ultimately making a decision that will impact many lives. If, while a juror is listening, they are focusing on their own preconceived notions of individuals acting in a certain way, the juror is allowing their preconceived biases to enter into the trial. Attorneys are also impacted by their implicit biases and rely on their own biases regarding potential jurors in their exercise of a peremptory challenge.[85] Because implicit biases occur unconsciously, they are harder to detect, and a juror or attorney may not realize that they even harbor such thoughts.

An attorney who holds implicit biases is also concerning because of the potential impact and interplay of those biases on the attorney's use of peremptory challenges. "Social science research has illuminated the direct impact that implicit biases have on the exercise of peremptory strikes."[86]

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[83] *Id.*
[84] *Id.*
[85] Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 32 (2014).
[86] SEMEL ET AL., *supra* note 11, at 30; *see also* Morrison, *supra* note 85, at 32.

Caren Morrison, an Associate Professor of Law at Georgia State University, explained that "because of the 'wide dissociative gap between what we believe our feelings to be and what they actually are,' a lawyer's inability to assess how a 'juror's race has affected her decision to strike' also means that 'she will be unable to explain it.'"[87] Implicit biases may be connected to an attorney's use of race-based peremptory challenges, which may result in an attorney's inability to explain their exercise of the challenge.[88] The attorney will not want to admit to the court that the strike was exercised due to a race-based reason and may not even be able to do so because of their dissociation, resulting with the attorney making up a different non-race-based reason to preserve their challenge.[89]

Jury selection is intended to determine whether a potential juror possesses the open frame of mind that is necessary to fairly serve as a juror and this encompasses implicit and explicit biases.[90] Yet, peremptory challenges can be discriminatorily used by prosecutors who attempt to justify the challenges based on their implicit or explicit biases. If implicit and explicit biases can no longer be used to provide justifications for excluding a juror based on their race or ethnicity, then challenge-users will be forced to look for non-discriminatory explanations for their exclusion. GR 37 incorporates the fact that implicit and explicit biases can perpetuate discrimination and is intended to return *voir dire* to the creation of an impartial jury. While GR 37 inspired other states, like California, to follow suit, Washington must still work to eliminate these biases from having a detrimental impact in the courtroom.

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[87] SEMEL ET AL., *supra* note 11, at 30; *see also* Morrison, *supra* note 85, at 32.
[88] Morrison, *supra* note 85, at 32.
[89] SEMEL ET AL., *supra* note 11, at 30; *see also* Morrison, *supra* note 85, at 32.
[90] WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS – CRIMINAL §1.01 (4th ed. 2016).

V. How the Use of Peremptory Challenges Has Changed Through Case Law

A. Prior to Batson*:* Swain v. Alabama *(1965)*

Before *Batson*, the controlling view on peremptory challenges was decided by the United States Supreme Court in *Swain v. Alabama*. In *Swain*, the Supreme Court highlighted that "[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[91] The Court determined that the ordinary exercise of peremptory challenges does not by itself imply purposeful discrimination and the challenges could be used to exclude "any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes."[92] *Swain* also shifted the burden to the defendant to show the prosecutor's systematic use of peremptory challenges against Black people over a period of time.[93] *Swain* put the onus on defendants to raise the occurrence of discrimination rather than forcing the prosecutors to immediately provide a reason for their peremptory. In doing so, it is unsurprising that *Swain* both failed to prohibit discriminatory use of peremptory challenges and also allowed for many convictions of Black defendants by all-white juries. Thus, *Swain* left open the possibility that peremptory challenges could be discriminatory and without justification.[94]

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[91] Swain v. Alabama, 380 U.S. 202, 219 (1965).
[92] *Id.* at 212.
[93] *Id.* at 227.
[94] *See* Gabriel, *supra* note 12.

B. Batson v. Kentucky *(1986)*

1. The Facts of *Batson v. Kentucky*

Twenty years after *Swain*, the United States Supreme Court began to reassess the problems of race and gender discrimination in jury selection.[95] *Batson* remains a case that is often referenced for its attempt and ultimate failure at eliminating racial bias in jury selection.[96] The case involved the trial of a Black man in Kentucky, in which the prosecutor used his peremptory challenges to strike all four Black people on the jury, leaving a jury that was composed of only white people.[97] The petitioner was convicted, and the case was brought before the Supreme Court on the issue of whether the prosecutor's use of their peremptory challenges to strike all four potential Black jurors violated the petitioner's right to have a jury drawn from a cross section of the community under the Sixth Amendment and §11 of the Kentucky Constitution.[98] The Court also considered whether the facts of the case showed that the prosecutor had in fact engaged in a "pattern" of discriminatory challenges and therefore established an equal protection violation under *Swain*.[99]

2. The *Batson* Court's Holding and Subsequent Acknowledgement of Purposeful Discrimination in the Use of Peremptory Challenges

In *Batson*, the Court found that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[100] The Court in *Batson* further reflected on the importance of a jury, finding that juries are intended to be "composed of the peers or equals

[95] Montoya, *supra* note 18, at 981–82.
[96] *See* Roberts, *Disparately Seeking Jurors*, *supra* note 18; *see also* Montoya, *supra* note 18, at 981.
[97] Batson v. Kentucky, 476 U.S. 79, 82–83 (1986).
[98] *Id.* at 83.
[99] *Id.* at 83–84.
[100] *Id.* at 86.

of the person whose rights it is selected or summoned to determine" and that jurors must be "indifferently chosen" for the defendant's right to "protection of life and liberty against race or color prejudice" to be upheld.[101] For a juror to be competent, they must be able to impartially consider evidence that is presented at trial.[102] Therefore, a juror's race does not dictate their fitness as a juror.[103] The discriminatory use of peremptory challenges that results in racial discrimination in jury selection is harmful to not only the accused, whose life and liberty is at stake, but also to the excluded juror and the community at large who have now had their confidence in the jury selection process undermined.[104]

In *Batson*, the State's use of peremptory challenges was subject to the confines of the Equal Protection Clause; therefore, the Court found that the prosecutor was not unlimited in their exercise of peremptory challenges.[105] The Court specifically highlighted how prosecutors could no longer use *any* reason to exclude a potential juror:

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant.[106]

The Court also rejected *Swain*'s requirement that the defendant bear the evidentiary burden to show a prosecutor's systematic discriminatory use of peremptory challenges, finding that the evidentiary requirement placed a

[101] *Id.* at 86–87.
[102] *Id.* at 87.
[103] *Id.*
[104] *Id.*
[105] *See id.* at 89.
[106] *Id.*

crippling burden of proof on defendants.[107] *Swain* had provided a result that was inconsistent with the promise of equal protection to all[108] by requiring evidence of several instances of discrimination before one defendant could raise an objection that the peremptory challenges were being used for a discriminatory purpose.[109] Instead, the Court found that a defendant need only rely solely on the facts concerning the racially discriminatory use of the peremptory challenges in the defendant's own case as opposed to requiring a defendant to show that several others suffered discrimination before being able to object.[110] With the new *Batson* rule, once the defendant is able to make a *prima facie* showing based on the facts of purposeful discrimination in jury selection, the burden shifts to the State to provide a neutral explanation for challenging jurors.[111]

3. *Batson*'s Implications for Peremptory Challenges

Batson is important because the Court recognized that peremptory challenges have been used to discriminate against Black and other underrepresented jurors and noted a need for change in the use of the challenges. The Court also emphasized how confidence in the criminal justice system would be influenced by increasing the population representations in those who report for jury service and decreasing discriminatory use of peremptory challenges:

> By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogenous population of our Nation, public respect for our criminal justice system and the rule of law will be

[107] *Id.* at 92.
[108] *Id.* at 96.
[109] *Id.* at 92.
[110] *Id.* at 95–96.
[111] *Id.* at 97.

> strengthened if we ensure that no citizen is disqualified from jury service because of his race.[112]

Because the petitioner in *Batson* had made a timely objection to the prosecutor's removal of all potential Black jurors and the trial court's rejection of the objection did not include a requirement of the prosecutor to explain his actions, the Court determined that the case should be remanded.[113]

Batson provided a remedy for defendants in the case of *intentional* discrimination by establishing a three-step test.[114] The *Batson* test requires (1) the objecting party to establish a sufficient showing or a *prima facie case* of purposeful discrimination; (2) the trial court to agree that the objecting party has made such a showing, at which point the burden shifts to the party making the strike to provide a "race-neutral" reason; and (3) the trial court to decide whether the objecting party has established purposeful discrimination.[115] Though the Court attempted to curb purposeful racially discriminatory uses of peremptory challenges, Justice Marshall, concurring in *Batson*, predicted that the Court's decision would not end race discrimination in jury selection primarily because a trial court would have difficulty assessing a lawyer's motives to exclude a potential juror.[116] Justice Marshall felt so strongly he even claimed that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[117] Many legal scholars and commentators have echoed Justice Marshall's concerns regarding peremptory challenges, and evidence supports Marshall's prediction that lawyers would offer feeble excuses for their discriminatory peremptory

[112] *Id.* at 99.
[113] *Id.* at 100.
[114] SEMEL ET AL., *supra* note 11, at 68.
[115] *Batson*, 476 U.S. at 96–98.
[116] *Id.* at 102–103.
[117] *Id.* at 107.

challenges that would be accepted by courts.[118] Such feeble excuses given by prosecutors who continue to use peremptory challenges discriminatorily long after *Batson* gave rise to Washington's own change to peremptory challenges through GR 37.

C. Post-Batson*:* J.E.B. v. Alabama *ex rel.* T.B. *(1994)*

Other cases have continued to address *Batson*'s shortcomings in decreasing racial and gender discrimination using peremptory challenges in jury selection.[119] In *J.E.B. v. Alabama ex rel. T.B.*, the United States Supreme Court noted that since *Batson*, progress had been made to provide jury selection procedures that were fair and nondiscriminatory.[120] Further, the Court "recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[121] In *J.E.B.*, the Supreme Court examined whether intentional discrimination on the basis of gender is prohibited by the Equal Protection Clause and ultimately found that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[122] The Court highlighted the fact that "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process," noting that there is a potential for the prejudice that motivated the peremptory challenge to impact the entire proceeding.

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[118] Montoya, *supra* note 18, at 1005.
[119] *See* J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127 (1994); City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); State v. Jefferson, 429 P.3d 467 (Wash. 2018); State v. Gonzalez-Sandoval, 431 P.3d 850 (Kan. 2018); State v. Berhe, 444 P.3d 1172 (Wash. 2019); State v. Veal, 930 N.W.2d 319 (Iowa 2019).
[120] *J.E.B.*, 511 U.S. at 128.
[121] *Id.*
[122] *Id.* at 129.

Similar to the negative impacts on the community noted in *Batson*, the Court found that the community's confidence in the impartiality of the jury is undermined by the prosecutor's continued perpetuation of group stereotypes in the courtroom.[123] The Court further determined that prohibiting the use of peremptory challenges to strike potential jurors solely on the basis of their gender did not imply that peremptory challenges should be eliminated as an element of jury selection.[124] Additionally, the Court found that the prohibition did not conflict with the legitimate purpose of using peremptory challenges to ensure a fair and impartial jury.[125] With the prohibition in place, jurors can still be removed, by way of a peremptory challenge, for another reason, as long as gender is not the predominant grounds for the removal.[126] The Court was opposed to eliminating jurors solely on the basis of their gender and identified how failing to protect against gender discrimination could also frustrate the purpose of *Batson*:

> Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.[127]

In *J.E.B.*, the Court also highlighted that all citizens, regardless of race, ethnicity, or gender, should have an equal opportunity to partake directly in our democracy by sitting on a jury.[128] Therefore, the Court supported the prohibition of using gender as a basis for a peremptory challenge because

[123] *Id.* at 140.
[124] *Id.* at 143.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 145.
[128] *Id.* at 145–46.

the integrity of the judicial system is compromised if people are excluded from participating as a juror solely because of their race or gender.[129]

Although *J.E.B.* added a prohibition of gender as a basis for peremptory challenges to *Batson*, using gender and race as an explicit basis for a peremptory challenge is not the only way that litigants can discriminate against potential jurors. In fact, litigants continue to subconsciously discriminate on the basis of race and gender in their use of peremptory challenges because of their implicit biases. The Washington Supreme Court enacted GR 37 in the hope of preventing implicit bias from affecting the use of peremptory challenges.

D. Post-Batson*:* City of Seattle v. Erickson

In *City of Seattle v. Erickson*, the Washington Supreme Court considered whether the defendant, Erickson, could bring a *Batson* challenge after the jury was empaneled and the rest of the venire excused.[130] Erickson, a Black man, was charged with unlawful use of a weapon.[131] After *voir dire*, the City of Seattle exercised a peremptory challenge against the only Black juror on the jury panel.[132] The jury was then empaneled, and after the jury and the rest of the venire had left the courthouse, Erickson objected to the peremptory challenge, claiming the strike was racially motivated.[133] In the decision, the court noted "'*Batson* . . . appears to have created a "crippling burden," making it very difficult for defendants to prove discrimination even where it almost certainly exists.' This underscores the need to amend our procedures and ensure that jury selection is more secure from the threat of racial prejudice."[134]

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[129] *Id.* at 145–46.
[130] City of Seattle v. Erickson, 398 P.3d 1124, 1128 (Wash. 2017).
[131] *Id.* at 1126.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 1131–32.

The Washington Supreme Court held if there is a peremptory strike of a juror who is the only member of a cognizable racial group, then the exercise of the peremptory challenge itself constitutes a *prima facie* showing of racial motivation.[135] The trial court is required to ask for a race-neutral reason from the striking party, and then the court is tasked with determining whether the peremptory challenge was exercised in a discriminatory manner based on the facts and circumstances.[136] In the decision, the Washington Supreme Court also noted that pending before the court in its administrative rule-making capacity, though not yet enacted, was a "proposed court rule that would alter the method for evaluating claims of race-based peremptory challenges so that the intentional discrimination that must be proved under *Batson* is no longer required."[137]

In mentioning the proposed rule, GR 37, the court noted the fact that the rule would "create a presumption against the validity of justifications such as 'expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling'" that were previously allowed in *Batson*.[138] In Erickson's case, the court determined that his objections were timely, and the municipal court erred when it failed to infer racial bias from the dismissal of the only Black juror on the jury panel.[139] *Erickson* portrays the evolution of peremptory challenges and how the challenges are still being used in a discriminatory manner. Significantly, *Erickson* notes how court rules such as GR 37 can address *Batson*'s shortcomings and begin to eliminate the discriminatory use of peremptory challenges.

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[135] *Id.*
[136] *Id.*
[137] *Id.* at 1133 (Stephens, J., concurring).
[138] *Id.* (Stephens, J., concurring).
[139] *Id.* (Stephens, J., concurring).

VI. DRAFTING AND ENACTING GENERAL RULE 37

GR 37 was originally drafted in 2015 by American Civil Liberties Union (ACLU) Deputy Legal Director Jeffery Robinson, American Civil Liberties Union of Washington's (ACLU-WA) Nancy Talner, ACLU-WA Cooperating Attorney Lila Silverstein, and La Rond Baker, in addition to other cooperating attorneys.[140] As support for the rule increased, the Washington Supreme Court requested that other organizations serve on a working group to help fine-tune the rule's language.[141] The attorneys who crafted the rule acknowledged that "minority racial and ethnic groups are disproportionately represented in Washington state's court, prison, and jail populations, relative to their share of the state's general population" and this required addressing disproportionalities across the criminal justice system.[142] The ACLU-WA submitted a proposal for GR 37, and the Washington Supreme Court published the rule for comment in November 2016 with the comment period ending April 30, 2017.[143] The rule was then examined by the Washington Association of Prosecuting Attorneys and the ACLU, as well as other organizations, judges, and individual attorneys.[144] A work group was then formed to generate cohesive language, and the work group submitted a new version of GR 37 in a final report in February of 2018.[145] The Washington Supreme Court adopted most of the work group's proposed GR 37 on April 5, 2018.[146] GR 37 was published and became effective on April 24, 2018.[147] In enacting GR 37, Washington became the first state to tackle racial bias in the jury selection process through a court

[140] ACLU Press Release, *supra* note 12.
[141] *Id.*
[142] RESEARCH WORKING GROUP, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 1 (2011).
[143] State v. Jefferson, 429 P.3d 467, 477 (Wash. 2018).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] WASH. CT. G.R. 37 (2018).

rule.[148] The drafters and advocates hope that the rule will "lead to fewer all-white juries—and, consequently, fairer trials"[149] by expanding the prohibitions against using race based peremptory strikes during *voir dire* and forcing strike users to look beyond their implicit and explicit biases.[150]

A. The Language of Washington's GR 37 and the Goals of the Rule's Drafters

GR 37 makes it more difficult to use a peremptory challenge to dismiss a juror based on their race or ethnicity, whether or not discrimination is the stated intent of the party issuing the challenge.[151] GR 37 states that a party or the court may raise an objection to a peremptory challenge if they believe the challenge is motivated by improper bias.[152] To determine the validity of the challenge, GR 37 states in part the following:

> **(e) Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.
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> **(f) Nature of Observer.** For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

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[148] Imani Gandy, *Washington Supreme Court Passes New Rule to Tackle the State's All White Jury Problem*, REWIRE NEWS (Apr. 11, 2018), https://rewire.news/ablc/2018/04/11/washington-supreme-court-passes-new-rule-tackle-states-white-jury-problem/ [https://perma.cc/7NPL-UNYA].
[149] *Id.*
[150] ACLU Press Release, *supra* note 12.
[151] Justice Mary I. Yu, *How Injustice and Inequality Have Been Addressed (And Sometimes Ignored) by the Washington Supreme Court*, 54 GONZ. L. REV. 155, 164 (2019).
[152] WASH. CT. G.R. 37 (2018).

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptive invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reasons as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely

> manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.[153]

Though racial discrimination is already unconstitutional, GR 37 "outlaws peremptory challenges based on '*implicit*, *institutional*, and *unconscious*' race and ethnic biases."[154] Prior to the enactment of GR 37, prosecutors were able to claim that a juror had a poor attitude, or that they seemed uninterested, nervous, indecisive, or bewildered, and use those reasons to strike the juror. (All of these reasons have been accepted by federal courts across the country.)[155] The hope of the drafters was that GR 37 "[would] reduce the damage done by racial and ethnic bias to the integrity of our judicial system and to communities of color."[156] GR 37 permits objections to peremptory challenges that go beyond purposeful discrimination, and such objections can now be made if an objective observer could view race or ethnicity as a factor in the use of a peremptory strike.[157] After *Batson*, peremptory challenges, when objected to on the basis of race discrimination, were often defended with reasons for excluding potential jurors that historically have been associated with race bias, such as demeanor-based justifications.[158] GR 37 makes such reasons presumptively invalid because demeanor-based justifications are often borne of implicit

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[153] WASH. CT. G.R. 37 (2018). Many of these examples of conduct and reasons for a peremptory being presumptively invalid originated from prior cases where such comments were used by prosecutors to discriminatorily excuse potential jurors. *See* State v. Jefferson, 429 P.3d 467 (Wash. 2018) (finding the reasons the prosecutor gave for excusing the juror, including that the juror exhibited a problematic attitude when they indicated *voir dire* was a "waste of time," combined with the juror's other responses, was likely pretext for intentional race discrimination). GR 37 could not be retroactively applied to this case as the enaction occurred after the trial.

[154] Gandy, *supra* note 148 (emphasis added).

[155] *Id.*

[156] ACLU Press Release, *supra* note 12.

[157] *Id.*

[158] *Id.*

biases and have historically been used to exclude potential jurors of color.[159]

B. How Other Courts and Legislators Have Applied and Referenced GR 37

Since Washington's enactment of GR 37, courts and legislators in Kansas, Iowa, Arizona, Oregon, Connecticut, and most recently California have considered the rule's impact on peremptory challenges and whether there is a need to implement a similar court rule or piece of legislation.[160] A multitude of cases have also led Washington courts to reflect on why GR 37 was adopted and on the circumstances necessary for the rule to be applicable to a given case.[161]

1. A Washington Case Brought Right After the Enactment of GR 37: *State v. Jefferson* (2018)

In *State v. Jefferson*, the Washington Supreme Court examined whether GR 37 applied to the case when Jefferson, an African-American defendant, was convicted and the State used a peremptory strike against the only African-American juror.[162] In its decision, the court noted the specific process of the rule's enactment and that GR 37 was adopted to address how to evaluate juror responses to determine "purposeful discrimination" and issues of "unintentional, institutional, or unconscious" racial bias.[163] The Washington Supreme Court acknowledged the unique path for GR 37's enactment and also acknowledged that "GR 37 became effective April 24,

[159] *Id.*
[160] *See* State v. Jefferson, 429 P.3d 467 (Wash. 2018). *See also* State v. Gonzalez-Sandoval, 431 P.3d 850 (Kan. 2018); State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Gentry, 449 P.3d 707 (Ariz. Ct. App. 2019); State v. Curry, 447 P.3d 7 (Or. Ct. App. 2019); State v. Holmes, 221 A.3d 407 (Conn. 2019); People v. Rhoades, 453 P.3d 89 (Cal. 2019).
[161] *See Jefferson*, 429 P.3d at 467; *see also* State v. Berhe, 444 P.3d 1172 (Wash. 2019); Karstetter v. King County Corrections Guild, 444 P.3d 672 (Wash. 2019); State v. Pierce 455 P.3d 647 (Wash. 2020).
[162] *Jefferson*, 429 P.3d at 477.
[163] *Id.*

2018, and remains effective now, while Jefferson's case is pending before us on direct appeal."[164]

GR 37 did not change the elements of Jefferson's alleged crime or anything about his potential punishment, nor did the rule attach new legal consequences to Jefferson's past acts.[165] The Washington Supreme Court ultimately determined that because Jefferson's trial, *voir dire*, and the *Batson* challenge all occurred before GR 37's April 24, 2018, effective date, the rule did not apply to the completed *Batson* challenge in Jefferson's case.[166] Although the Washington Supreme Court found that GR 37 could not be retroactively applied to the *voir dire* in Jefferson's case, the concurrence in part and dissent in part in *Jefferson* noted the necessity for a court rule to fill in the gaps left open by *Batson* and address the issue of race discrimination in jury selection, finding that "trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge. In this case, an objective observer could view race as a factor in the peremptory strike of Juror 10."[167] *Jefferson* implicated the necessity of GR 37 and how the rule could positively impact race discrimination in *voir dire*.

2. An Iowa Case Brought After the Enactment of GR 37: *State v. Veal* (2019)

In *State v. Veal*, an African-American defendant was charged with committing two murders, and although the jury venire contained five

[164] *Id.* at 478.
[165] *Id.* at 479.
[166] *Id.* at 477. The Washington Supreme Court analyzed the rule of prospective application and the rule that a newly enacted statute or court rule generally applies to all cases pending on direct appeal to determine whether GR 37 could be retroactively applied to Jefferson's case. Ultimately, the Court determined that "the newly enacted statute would only be applied to proceedings that occurred far earlier in the case if the 'triggering event' to which the new enactment might apply has not yet occurred," but in Jefferson's case, the *Batson* challenge and jury selection had both occurred *before* GR 37 was enacted and became effective. *Id.* at 478 (emphasis added).
[167] *Id.* at 481.

African-Americans, no African-American was seated on the jury because the State exercised a peremptory strike on the remaining African-American on the panel.[168] Justice Brent Appel's concurrence noted Washington's adoption of GR 37 and the fact that the rule regulates peremptory challenges.[169] Justice Appel's concurrence further commented that because African-Americans and other minorities make up such a small portion of Iowa's population, there is a greater need for a reexamination of the *Batson* framework and preservation of the fair cross-section requirement.[170] Although Justice Appel noted that Iowa recently revised fair cross-section jurisprudence, the justice determined the need to ensure that "gains made today are not eliminated by a *Batson* framework that permits the elimination of African-American petit jurors through the back door of peremptory challenges."[171] *Veal* indicates that there is a need across the country for the implementation of a rule that addresses the current exclusion of Black jurors and also the potential for such a rule to be utilized in Iowa.

VII. USING CALIFORNIA'S MOVE TOWARDS ENACTING ASSEMBLY BILL 3070 AS AN EXAMPLE OF WHY WASHINGTON MUST REEXAMINE GR 37 AND FURTHER PEREMPTORY CHALLENGE REFORM

This section and the following section will use California as an example to show why Washington must learn from other states and remain an active participant in achieving nationwide reform to peremptory challenges. First, this section will focus on the demographic makeup of California in comparison to Washington and discuss how California's version of GR 37, AB 3070, is needed because the more diverse a state's incarcerated population, the greater the need for a rule like GR 37. Next, this section will

[168] State v. Veal, 930 N.W.2d 319, 324 (Iowa 2019).
[169] *Id.* at 358.
[170] *Id.* at 359.
[171] *Id.*

examine how recent changes to California's policies and laws as well as a Supreme Court case support the implementation of AB 3070. This section will then highlight the differences between the language for AB 3070 and GR 37. Next, this section will examine other areas that Washington failed to address with GR 37 and explain why a reexamination is needed. Finally, this section will conclude by recommending another mechanism for increasing juror diversity that Washington could employ in addition to making amendments to GR 37's current language.

A. How the Population Demographics of Washington Compare to the Demographics of California and Why Changes Promoting Juror Diversity Are Needed

Recent actions taken by the California State Legislature show that California is already aware of the need for balanced and equitable juries. California is following in Washington's footsteps and has incorporated GR 37 into the state's own piece of legislation.[172] To guarantee that Sixth Amendment rights to an impartial jury are honored, California passed GR 37-like legislation that also addresses purposeful discrimination that is inherent in the state's current jury selection practices.[173] California is more diverse than Washington and may have even more of a need for a court rule or law that promotes juror diversity.

As of the 2010 Census, the State of Washington population was 6,724,540 with the following race and ethnic categories:[174]

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[172] A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

[173] *See* Senator Wiener Announces Bill, *supra* note 30; Gartrell, *supra* note 31; A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020); SEMEL ET AL., *supra* note 11.

[174] WASH. STATE OFF. OF FIN. MGMT.: WASHINGTON PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS, Table DP-1 (2010), https://www.ofm.wa.gov/sites/default/files/public/legacy/pop/census2010/dp1/data/state/wa_2010_dp1_state_04000US53.pdf [https://perma.cc/9ZX9-2HGE].

White	Black or African-American	Asian and Pacific Islander	Hispanic or Latino	Native American and Other
77.3%	3.6%	15.2%	8.9%	0.9%

Although people of color represent a minority of the population in Washington, they make up the majority of incarcerated individuals.[175] In 2018, 37,000 Washington residents were incarcerated in various facilities. The following table shows the incarceration rate in Washington per 100,000 residents of a given race or ethnicity:[176]

White	Black or African-American	Hispanic	American Indian/Alaska Native
392	2,372	601	1,427

As of the 2010 Census, the State of California population was 37,253,956 with the following race and ethnic makeup:[177]

White	Black or African-American	Asian	Other (Including Hispanic and Latino)	American Indian and Alaska Native	Native Hawaiian and Other Pacific Islander	Two or More Races
57.59%	6.17%	13.05%	16.96%	0.97%	0.39%	4.87%

In California, as of 2010, people of color again represent the minority of the population and as in Washington, they make up the majority of the

[175] PRISON POLICY INITIATIVE, *Washington State Profile*, https://www.prisonpolicy.org/profiles/WA.html [https://perma.cc/F3N8-PCWU].
[176] *Id.*
[177] STATE OF CAL. DEP'T OF FIN., CALIFORNIA DEMOGRAPHIC PROFILES: CENSUS 2010, http://www.dof.ca.gov/Reports/Demographic_Reports/Census_2010/#SF1 [https://perma.cc/NX3Q-LD8L].

individuals who are incarcerated.[178] As of 2018, there were 241,000 individuals incarcerated in the State of California. The following table shows the incarceration rate in California per 100,000 residents of a given race or ethnicity:[179]

White	Black or African-American	Hispanic	American Indian/Alaska Native
453	3,036	757	996

In California Courts, "a total of 9,279 jury trials were recorded across all case types. Jury trials held in the Superior Courts in [the] fiscal year of 2015–2016 included 4,822 felonies, 3056 misdemeanors, 1,142 civil unlimited, 232 civil limited, and 27 probate and mental health cases."[180] California and Washington are similar in that in both states, people of color represent the minority of the population but the majority of the individuals who are incarcerated. Because most people who are incarcerated are people of color, it is imperative that these individuals are given a jury that actually reflects their peers. This is ultimately difficult in states like California and Washington where the majority population is white; therefore, the likelihood of an all-white jury is much higher. Changes promoting juror diversity are needed to adhere to the Sixth Amendment and give those who are being tried a truly impartial jury of their peers.

The disparities between incarceration rates of non-white and white people in California and across the country may be due in part to racial disparities in juror diversity and the impact that may have on rates of conviction for different populations. Implicit bias in jury selection can often

[178] PRISON POLICY INITIATIVE, *California Profile*, https://www.prisonpolicy.org/profiles/CA.html [https://perma.cc/K6LZ-K8P3].
[179] *Id.*
[180] JUDICIAL COUNCIL OF CALIFORNIA, 2017 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 2006-2007 THROUGH 2015-2016 (2017), https://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf [https://perma.cc/7QJY-38SD].

create a jury pool that is not indicative or representative of the population, and a court rule that aims to increase jury diversity, like GR 37, is therefore important in places where there are higher rates of incarceration. Without such a court rule, attorneys can use peremptory challenges to remove jurors for discriminatory reasons without giving an explanation or by using a juror's demeanor as a reason for the strike. Accused individuals who also identify as members of an underrepresented population are more harshly impacted by rules and procedures that have systematic racist effects and are left without a representative jury of their peers.[181] Due to the discriminatory way peremptory challenges have been historically used, one can make the connection that it is unlikely those who are now incarcerated were given a truly impartial jury of their peers. To preserve the fair cross-section requirement of the Sixth Amendment to the Constitution, it is imperative that California and other states across the country reexamine the *Batson* framework and prevent the exclusion of members of underrepresented groups from the jury.

B. How GR 37 or a GR 37-Like Court Rule Could Impact the Make-Up of a Jury

GR 37's new process will impact the make-up of a jury by presenting another hurdle that attorneys need to surmount in order to use a peremptory challenge. Because attorneys will need to provide a justification for the challenge that an objective observer would agree is not based on racial bias, the attorney will have a more difficult time eliminating a juror based on their race or ethnicity. As previously stated, some oft-used justifications, such as demeanor-based justifications, are often coded language used to exclude jurors for discriminatory purposes. Thus, GR 37 or a similar court rule will provide an added barrier to attorneys attempting to exclude a juror

[181] TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 1 (2011), http://www.law.seattleu.edu/x8777.xml [https://perma.cc/67BH-Z3DY].

for a reason that is unrelated to their ability to be impartial and open-minded.

GR 37's new process will also require the court to carefully examine the justifications attorneys are providing for their use of a peremptory challenge. Courts will need to be able to discern when an attorney is using a justification that is permeated with implicit and explicit biases. Without close attention to the reasoning, discriminatory use of peremptory challenges may prevail, leaving GR 37 moot. GR 37 or a similar court rule thus has the potential to increase jury diversity if the rule is thoroughly applied by all parties involved.

C. California Supreme Court Justice Liu and Berkley Law's Death Penalty Clinic Reference GR 37 and Push California to Follow Washington in Enacting Peremptory Challenge Reform

The California Supreme Court has also acknowledged the need to reexamine how peremptory challenges are used in California courts. On November 25, 2019, California Supreme Court Justice Goodwin Liu wrote a strongly worded dissent highlighting Washington's recently enacted GR 37 and the need for California to change its own discriminatory use of peremptory challenges.[182] In the case, *People v. Rhoades*, the prosecutor summarily used four of their eight peremptory challenges to eliminate every African-American seated in the jury box during *voir dire* for the penalty retrial in a capital punishment case.[183] The defendant raised a *Batson* challenge, which the trial court denied.[184]

In his dissent, Justice Liu commented on the fact that the majority opinion found no inference of discrimination after following the first step of *Batson*.[185] Instead, and most importantly, the court said, "the record

[182] People v. Rhoades, 453 P.3d 89 (Cal. 2019).
[183] *Id.* at 116–17.
[184] *Id.*
[185] *Id.* at 139 (Liu, J., dissenting).

discloses readily apparent grounds for excusing each prospective juror, dispelling any inference of bias that might arise from the pattern of strikes alone."[186] Justice Liu also noted that such reasoning is common in other cases and causes the Justices to hypothesize the potential reasons for removal of underrepresented jurors rather than properly using the *Batson* framework to produce actual answers to claims of discrimination prevalent in the process of jury selection.[187] Important to this Note is the fact that Justice Liu highlighted Washington's new GR 37 court rule and decisions of other state high courts to essentially eliminate *Batson*'s first step.[188]

Clinical Professor of Law and Director of Berkley Law's Death Penalty Clinic Elisabeth Semel led the Death Penalty Clinic's Class of 2020 students in researching and writing a report addressing California's perpetuation of discriminatory exclusion of Black and Latinx jurors from the venire.[189] Together, Semel and the law students wrote the report *Whitewashing the Jury Box*.[190] The report highlights empirical evidence showing how implicit biases play a significant role in the exercise of peremptory strikes, and it incorporates California appellate court opinions to demonstrate this point further.[191] The report also acknowledges Washington's leadership in enacting GR 37. Semel states unequivocally that not only have California courts utterly failed to overturn a *Batson* case, but the higher courts have also failed to even find a single trial court to have committed an error in denying a defendant's objection to the prosecutor's use of a peremptory strike in over thirty years.[192] The report concludes by calling for the California Legislature to follow Washington's leadership and

[186] *Id.* (Liu, J., dissenting).
[187] *Id.* (Liu, J., dissenting).
[188] *Id.* at 148. (Liu, J., dissenting).
[189] SEMEL ET AL., *supra* note 11.
[190] *Id.*
[191] *Id.* at v–viii, 12–27.
[192] *Id.* at vii–viii.

pass AB 3070 to address the persistent discrimination in jury selection, specifically in the usage of peremptory challenges.[193]

D. Differences Between California's AB 3070 and Washington's GR 37

AB 3070 Juries: Peremptory Challenges was introduced by Assembly member Dr. Shirley K. Weber during the California Legislature's 2019–2020 Regular Session on February 21, 2020.[194] AB 3070 is an addition to § 231.7 of the Code of Civil Procedure.[195] On September 30, 2020, AB 3070 was signed by Governor Newsom and enacted.[196]

AB 3070 contains nearly identical language to GR 37 with some key distinctions. For all jury trials beginning after January 1, 2022, AB 3070 prohibits any party from "using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, *gender*, *gender identity*, *sexual orientation*, *national origin*, or *religious affiliation*, or the perceived membership of the prospective juror in any of those groups."[197] AB 3070 specifically includes gender, gender identity, sexual orientation, national origin, and religious affiliation, which are left out of GR 37. In Section 1(B), AB 3070 specifically notes the disproportionate harm to African-Americans, *Latinos*, *and other people of color* from the exercise of peremptory challenges and that proof of intentional bias renders the current procedure for exercising a peremptory strike ineffective.[198] Washington's GR 37 does not specify which racial groups are often targeted by the discriminatory exercise of peremptory challenges.

Another point of comparison between GR 37 and AB 3070 is their limitations on the reasons for peremptory challenges in order to curb

[193] *Id.* at ii, ix–xi, 71.
[194] A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020).
[195] *Id.*
[196] *Id.*
[197] *Id.* (emphasis added).
[198] *Id.* (emphasis added).

unconscious, implicit, and institutional biases. While both include certain prohibitions on an attorney's bases for making a peremptory challenge, California's AB 3070 goes much farther than GR 37. AB 3070 provides nearly **twice as many** reasons where a peremptory challenge would be presumptively invalid. In addition to the reasons included in GR 37, AB 3070 adds the following presumptively invalid reasons for exercising a peremptory challenge:

> (8) The ability to speak another language.
>
> (9) Dress, attire, or personal appearance.
>
> (10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).
>
> (11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.
>
> (12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).
>
> (13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.[199]

If the party exercising the peremptory strike can show that "an objective reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national

[199] *Id. Compare* WASH. CT. G.R. 37 (2018), *with* A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (specifically § 231.7(e)(8)–(13)).

origin, or religious affiliation, or perceived membership in those groups,"[200] then the party may use one of the presumptively invalid reasons.

Neither California nor Washington included reasons pertaining to a juror's socioeconomic status as presumptively invalid for using a peremptory challenge. Research has shown that an individual's socioeconomic status is closely connected to their race and ethnicity.[201] Washington and California should both consider eliminating juror exclusion based on implicit and explicit biases related to socioeconomic status because socioeconomic status, race, and ethnicity are all intimately related. Due to the connection between socioeconomic status, race, and ethnicity, it is conceivable that without a prohibition on discriminatory strikes based on socioeconomic status, a peremptory challenge could be used in reference to someone's income or class as a way to avoid explicitly acknowledging the juror's race.

VIII. METHODS FOR WASHINGTON TO STAY ACTIVE IN NECESSARY PEREMPTORY CHALLENGE REFORM

A. Washington Should Reexamine and Amend GR 37's Language to Stay an Active Reformer of Peremptory Challenges

California's AB 3070 addresses several key categories that Washington neglected to include in GR 37, such as implicit and explicit biases related to a juror's gender, gender identity, and sexual orientation. These classifications do not prevent a juror from being impartial and are also often used as means to make the jury less diverse.[202] No individual should be subjected to discrimination simply for performing their civic duty, and a

[200] A.B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020).
[201] *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS'N, https://www.apa.org/pi/ses/resources/publications/minorities [https://perma.cc/2AAU-T9X5]; *see* David R. Williams & Selina A. Mohammed, *Racism and Health I: Pathways and Scientific Evidence*, 57 AM. BEHAV. SCI. 1152–1173 (2013).
[202] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (holding gender is an unconstitutional proxy for juror competence and impartiality).

potential juror's gender identity, or sexual orientation is of no hinderance to their ability to be impartial. A person's gender or sexual orientation should also not be used to make jury pools conform to the gender binary. Washington should thus view gender identity and sexual orientation as encompassed under the holding in *J.E.B.*, though it would provide further distinction and importance to have Washington specifically identify gender identity and sexual orientation as included biases that the court rule prohibits from peremptory challenge bases. Washington should also amend GR 37 to include the other reasons for presumptively invalid peremptory challenges that California included in AB 3070, such as implicit and explicit biases related to a juror's religious affiliation and national origin. These classifications also do not prevent a juror from being impartial and should therefore be included in GR 37 as presumptively invalid reasons for excusing a juror.

In conducting research for this Note, I spoke to several Washington attorneys and a superior court judge who told me that GR 37 is known by attorneys but rarely used.[203] In talking to King County Superior Court Judge David Keenan, I began to wonder whether attorneys in Washington actually understand GR 37 and have been specifically trained in how to use the rule appropriately in court. The rare usage of GR 37 may be a result of the rule's recency and perhaps GR 37 will be used more frequently as attorneys' familiarity increases. In addition to making the above changes to GR 37's language, Washington should offer opportunities for defense counsel and prosecutors to have continuing legal education classes specifically focused on GR 37 and peremptory challenges to facilitate such familiarity.

[203] Interviews with Judge David Keenan, King County Superior Court Judge (Oct. 8, 2020 & Jun. 11, 2020).

B. Washington Should Implement Another Method to Address Batson's Shortcomings and to Further Improve Juror Diversity

Even with the enactment of GR 37, Washington must still look to find other means of achieving juror diversity reform. One potential mechanism for increasing juror diversity is to incentivize individuals to serve as a juror by paying them at a higher rate. Currently, potential jurors may assert that they have a financial hardship which prevents them from serving as a juror. Financial hardships are especially prevalent if the individual is not compensated for jury service by their employer or they are self-employed and cannot afford to miss work in order to serve as a juror.[204] The low juror compensation of $10 per day in Washington has not been adjusted since 1959 and is believed to have a detrimental impact on prospective jurors and to contribute to the underrepresentation of some populations in the jury pool.[205]

The daily rate of juror compensation varies nationally and sometimes includes travel expenses or mileage.[206] Juror pay in state courts is determined by each county or by state statute and can range from $0 per day to $50 per day, with some states opting for a varied rate depending on

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[204] WASHINGTON STATE JURY COMMISSION, *Appendix 2: Excuse and Deferral Guidelines*, https://www.courts.wa.gov/committee/?fa=committee.display&item_id=266&committee_id=101 [https://perma.cc/FXD2-CU7B].

[205] WASH. STATE CTR. FOR COURT RSCH., ADMINISTRATIVE OFFICE OF THE COURTS, JUROR RESEARCH PROJECT: REPORT TO THE WASHINGTON STATE LEGISLATURE 4 (Dec. 24, 2008), http://www.courts.wa.gov/subsite/mjc/docs/2017/2008%20Juror%20Research%20Project%20-%20Washington%20State%20Center%20for%20Court%20Research.pdf#search=juror%20pay [https://perma.cc/3P6S-W736]; *see also* Anita Khandelwal & Michele Storms, Opinion, *Increase Jury Pay to Address Racial Bias in Criminal Justice System*, SEATTLE TIMES (Oct. 27, 2019), https://www.seattletimes.com/opinion/increase-jury-pay-to-address-racial-bias-in-criminal-justice-system/ [https://perma.cc/M5BW-KG3D].

[206] Evan Bush, *How Washington Compares when it Comes to Paying Jurors*, SEATTLE TIMES (Aug. 9, 2016), https://www.seattletimes.com/seattle-news/how-washington-compares-when-it-comes-to-paying-jurors/ [https://perma.cc/EE7KK-WB89].

the number of days of service.[207] For example, in California, jurors are paid $15 per day beginning on the second day of their service and each juror also receives $0.34 per mile they travel to court.[208] At the federal level, juror pay is set by federal statute and funded by Congress.[209] In 2018, Congress increased the federal juror pay from $40 each day, which was well below the federal minimum wage, to $50 per day.[210] The bipartisan House members supporting the increase stated, "[w]hile juror compensation was never meant to serve as a substitute for a salary and obviously does not, raising the daily rate of juror compensation to $50 per day would provide some small relief for the sacrifices made by jurors."[211] The lawmakers further asserted that the pay increase would hopefully lead to fewer jurors seeking excuses from service and therefore improve both the efficiency and empaneling of more representative juries.[212]

In contrast to federal jurors who are now paid $50 per day, jurors in Washington state are only compensated $10 per day for their service.[213] In August of 2016, a lawsuit filed in King County claimed that the inadequate expense payment to jurors was a contributing factor to the exclusion of

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[207] *Id.*

[208] CALIFORNIA COURTS – THE JUDICIAL BRANCH OF CALIFORNIA, JURY SERVICE, https://www.courts.ca.gov/juryservice.htm#:~:text=Juror%20Pay,them%20an%20additional%20daily%20fee. [https://perma.cc/R9UC-L4GL].

[209] Spencer S. Hsu, *Federal Jurors Will Soon Receive Their First Pay Increase in Nearly 30 Years*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/local/public-safety/federal-jurors-get-their-first-raise-in-nearly-30-years/2018/03/26/3ba6f646-311b-11e8-8bdd-cdb33a5eef83_story.html [https://perma.cc/LFE4-32XN].

[210] *Id.* Currently, federal minimum wage is $7.25 per hour which translates to $58 per day for eight hours of work. MINIMUM WAGE, U.S. DEP'T OF LABOR (2020), https://www.dol.gov/general/topic/wages/minimumwage [https://perma.cc/24BZ-XQXK]. The increase of federal juror pay to $50 per day is $8 below federal minimum wage.

[211] Hsu, *supra* note 209.

[212] *Id.*

[213] KING CNTY. SUPERIOR CT., JURY SERVICE – FREQUENTLY ASKED QUESTIONS, https://www.kingcounty.gov/courts/superior-court/juror-information/FAQ.aspx#:~:text=Jurors%20currently%20earn%20%2410.00%20per,ferry%2C%20or%20water%20taxi%20fare [https://perma.cc/M7JX-V4XP].

people in poverty [or the indigent] and individuals from underrepresented populations from the venire.[214] Judges in King County and across the country see the detrimental impact that undue financial hardships of sitting on a jury can have in their courtrooms.[215] "While no one keeps overall statistics on juror excuses, those closest to the process say that in many parts of the country, an increasing amount of jurors are trying to get out of service due to economic hardship claims."[216] Juror pay is related to a criminal defendant's right to a fair trial because inadequate juror compensation has a detrimental impact on a low-income individual's ability to serve as a juror.[217] Low-income jurors may not be able to afford to take time off, their employers may refuse to compensate them for time off, and taking time off may put them at risk of losing their jobs.[218] The result is an underrepresentation of Black, Indigenous, and people of color in the jury pool and a lack of an impartial jury. Enacting a court rule that addresses *Batson*'s shortcomings for peremptory challenges is one method to help increase juror impartiality, but Washington should also implement an increase in juror pay to address the larger racial problems that are inherent in the criminal justice system.

IX. CONCLUSION

Although GR 37's immediate impact on peremptory challenges and the jury selection process is unknown, there is hope that the discriminatory use of peremptory challenges in Washington state will decrease substantially. With GR 37, there is also hope that implicit bias in jury selection will

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[214] Evan Bush, *How Washington Compares When it Comes to Paying Jurors,* SEATTLE TIMES (Aug. 9, 2016), https://www.seattletimes.com/seattle-news/how-washington-compares-when-it-comes-to-paying-jurors/ [https://perma.cc/ES5N-4P2Y].
[215] John Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, N.Y. TIMES (Sept. 1, 2009), https://www.nytimes.com/2009/09/02/us/02jury.html [https://perma.cc/3PHH-U7K5].
[216] *Id.*
[217] Khandelwal & Storms, *supra* note 205.
[218] *Id.*

decrease and people of color will no longer be denied a jury of their peers. Because of Washington's leadership in combatting implicit biases prevalent in the justifications prosecutors provide to defend their discriminatory exercise of peremptory challenges, other states have taken note and begun their own examinations of peremptory challenges. If other states follow a similar process to Washington and California and ultimately choose to incorporate implicit biases into their peremptory challenge rules, the states will hopefully see a rise in jury venires that are representative of the population and a fall in discriminatory use of peremptory challenges.

It is likely that GR 37 and similar court rules will only be the start of what is needed to actually address the inequities in jury selection and inherent biases that exist throughout the criminal justice system. However, Washington's leadership in addressing *Batson*'s shortcomings and its openness to learning from the methods and language used by other states is one small way that change can occur. We are well past the time when implicit and intentional biases need to be eliminated from jury selection, and we owe it to all who are accused to let their case be heard by an impartial jury of their peers. By confronting the discriminatory use of peremptory challenges head on, we begin to effectuate the original intention of the Sixth Amendment and give those who are accused an impartial jury of their peers.

With the multitude of ensuing changes to peremptory challenges in California and other states across the country, Washington must not be complacent and must instead remain an active participant in preventing the discriminatory use of peremptory challenges and in renewing belief in judicial integrity.[219] The onus is now on Washington to learn from the changes other states are making to peremptory challenges, to address GR

[219] Annie Sloan, *"What to do about Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233 (2020).

37's shortcomings, to make new suggestions for GR 37 implementation, and to push for a truly impartial jury once and for all.